Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ADAM N. STILLO,

Petitioner,

v.

WILLIAM HEDRICK and CYNTHIA GIACCHETTI,

Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR A WRIT OF CERTIORARI

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23PP

QUESTIONS PRESENTED

1. Must there be an exhaustion of remedies, thereby tolling the Illinois two-year statute of limitations for the filing of a legal malpractice action?
2. Must a criminal defendant prove that he was innocent of the crime charged before proceeding with a legal malpractice action against his defense attorney?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests this Court to issue a Writ of Certiorari to the Appellate Court of Illinois, First District, to review that Court's decision and opinion entered on March 19, 1998 (App. A), with a subsequent denial of Petition for Leave to Appeal by the Illinois Supreme Court on October 6, 1998 (App. B).

OPINIONS BELOW

On March 19, 1998, the Illinois Appellate Court of the First District entered a summary order (App. A) affirming the decision of the Circuit Court of Cook County, wherein the Circuit Court had ruled that the petitioner's legal malpractice claim against the respondents had to have been filed within two years from when the petitioner knew or reasonably should have known of his injury from the attorneys' alleged malpractice at least as early as the sentencing of the petitioner on July 18, 1993, and that the statute of limitations was not tolled until the exhaustion of remedies.

In conjunction with the Illinois Appellate Court, First District, summary order, the Appellate Court also ruled that a criminal defendant cannot bring a legal malpractice claim against his defense attorney until he has successfully overturned his conviction thereby proving the defendant's innocence.

On October 6, 1998, the Supreme Court of Illinois denied the petitioner's Petition for Leave to Appeal (App. B).

JURISDICTION

1. The decision of the Illinois Appellate Court, First District, was entered on March 19, 1998.

2. The denial of the Petition for Leave to Appeal by the Supreme Court of Illinois was entered on October 6, 1998.

3. The Petition for Writ of Certiorari was filed less than 90 days from the denial of the Petition for Leave to Appeal by the Supreme Court of Illinois, said denial occurring on October 6, 1998.

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petitioner, Adam N. Stillo, Sr., engaged the legal services of William Hedrick and Cynthia Giacchetti, licensed Illinois lawyers, to represent him in a criminal matter that had been pending in the United States District Court, Northern District of Illinois, entitled United States of America v. Adam N. Stillo, Sr., No. 91 CR 795. (C3)

Prior to the commencement of trial of this matter, legal counsel, William Hedrick and Cynthia Giacchetti, had been provided certain information that would have established that the petitioner, Adam N. Stillo, Sr., a sitting judge in the Circuit Court of Cook County, Illinois, could not have been involved in any bribery scheme with Robert Cooley, a disbarred Illinois attorney, said bribery scheme involving the petitioner, as a sitting judge, in a misdemeanor court, wherein Robert

Cooley represented certain clients before the petitioner, as a sitting judge. (C3)

The respondents, William Hedrick and Cynthia Giacchetti, legal counsel for the petitioner, failed and made no attempt to ascertain the validity of Adam N. Stillo, Sr., appointments as a sitting judge, and if they had, they would have discovered that at no time could Judge Adam N. Stillo, Sr., have participated in a bribery scheme involving Robert Cooley, concerning resolution of certain misdemeanor cases, since the petitioner never sat in a misdemeanor courtroom for the following periods of time, when the alleged bribery scheme existed between the petitioner and Robert Cooley:

A. From June 1, 1964, to August 15, 1976, the petitioner heard traffic and misdemeanor matters;

B. From August 16, 1976, to May 1, 1978, the petitioner was assigned to the Maywood Branch of the Criminal Division, where he heard only felony matters, and during which period of time Judge Richard Fitzgerald was the presiding judge of the criminal division;

C. From May 1, 1978, to February 1, 1982, the petitioner was assigned to the Criminal Division, located at 1347 South Michigan Avenue, replacing then the Circuit Court Judge John Nordberg;

D. During that period of time from May 1, 1978, to February 1, 1982, Robert Cooley may have appeared in the petitioner's courtroom a few times, but never disposed of a case assigned to court call;

E. From May 1, 1978, to February 1, 1982, Robert Cooley withdrew his representation in two of such cases and had no other cases before the petitioner;

F. From February 1, 1982, to August 1, 1988, the petitioner was assigned to the Fourth Municipal District, in Maywood, Illinois, where he heard primarily misdemeanor cases and a few felonies. (C4-5)

The above allegations are supported by affidavits of the petitioner, affidavit #1 (C10-12); Lewis Zezulka, employed by the Sheriff's Office of Cook County, Illinois, a Deputy Sheriff, who was a personal bailiff of the petitioner from 1976 until 1988, affidavit #2 (C13-14); Brian C. Silverman, a former public defender of Cook County, Illinois, supervisor of the Felony Unit of Public Defender's Office in the Maywood Branch of the Criminal Division of the Circuit Court of Cook County, Illinois, from August 1976 through January 1, 1978, affidavit #3 (C15); Susan Dineff, who researched the records for Attorney Michael D. Ettinger, who had been representing Judge Adam N. Stillo, Sr., for the purpose of determining if any cases were assigned to the petitioner while he was assigned to 1340 South Michigan, Chicago, Illinois, affidavit #4 (C16); and Eugene Steingold, who served as an assistant state's attorney in Judge Stillo's courtroom at 1340 South Michigan, the felony courtroom, from March 1981 to September 1981, during which period of time Judge Stillo never heard any misdemeanor cases, nor did Robert Cooley represent any defendant in cases assigned to Judge Stillo's court call, affidavit #5 (C17). (C5)

The petitioner was denied effective assistance of legal counsel by the respondents, William Hedrick and Cynthia Giacchetti, for their failure to investigate properly the provided information as specified in the complaint, paragraph 3.A.-F., with the consequence that Robert Cooley's perjured testimony was not contradicted, that

the petitioner did not preside over misdemeanor cases wherein Robert Cooley was involved relative to a bribe scheme that allegedly existed between the petitioner and Robert Cooley in disposing of certain misdemeanor cases, thereby resulting in a conviction of the petitioner by a jury sitting in the United States District Court. (C6)

Although the government had provided hundreds of documents to petitioner's legal counsel, William Hedrick and Cynthia Giacchetti, both legal counsel failed to investigate those matters brought forth by the above discovery, resulting in the respondents', William Hedrick and Cynthia Giacchetti, failure to prepare the cross-examination or a proper defense based upon the materials provided before trial, with the result that the ultimate verdict rested solely upon the testimony of Robert Cooley, who had already demonstrated that he lied under oath. (C6)

The petitioner was denied effective legal counsel when the defense could have called witnesses, the names of whom had been provided to the respondents, including but not limited to the names of witnesses who are identified in affidavits #2, #3, #4, and #5, as attached to the complaint, and those witnesses would have refuted Robert Cooley's lies, which information the defense did not utilize, resulting in a lack of preparation and failure to do an adequate job, thereby enabling the jury to find the petitioner guilty in relation to a bribery scheme between Robert Cooley and the petitioner, involving certain misdemeanor cases. (C6-7)

The petitioner was denied effective legal counsel by the respondents, William Hedrick and Cynthia Giac-

chetti, when he was denied his right to testify on his own behalf, when, in fact, petitioner informed defense counsel that his intent was to testify, but defense counsel informed the petitioner that the petitioner would not testify, as the respondents, William Hedrick and Cynthia Giacchetti, advised the petitioner that his testimony would be refuted by unknown, undisclosed, government witnesses, which names of alleged witnesses defense counsel should have persisted in securing from the government via discovery by forcing the government to disclose the names of the alleged witnesses who would be so testifying. (C7)

The petitioner was denied effective legal counsel by the respondents, William Hedrick and Cynthia Giacchetti, when a potential witness, Nicholas M. Spina, was also represented by one of the legal counsel herein as an attorney for Nicholas M. Spina in the same criminal proceedings involving the petitioner. (C7)

Nicholas Spina's testimony was essential in that his testimony would have convinced the jury that William Swano was a perjurer, thereby enabling the jury to find the petitioner not guilty of participating in an alleged bribery scheme between the petitioner and William Swano involving the disposition of certain felony cases. (C7)

Pursuant to the ineffective legal counsel representation by the respondents, William Hedrick and Cynthia Giacchetti, as alleged in this complaint, the petitioner was found guilty of a bribe scheme, involving Robert Cooley and the petitioner, pertaining to certain misdemeanor cases, by a jury sitting in the United States District Court, and was sentenced to a four year term on July 18, 1993. (C8)

On June 9, 1995, United States Court of Appeals for the Seventh Circuit affirmed the conviction and the sentence of the petitioner by the United States District Court. (C8)

On October 30, 1995, the United States Supreme Court denied petitioner's petition for writ of certiorari. (C8)

Subsequent to the denial of the petition for writ of certiorari by the United States Supreme Court, on October 30, 1995, the petitioner was required to forfeit his license to practice as an Illinois attorney, and forfeited his portion of Social Security benefit and judge's retirement benefit, both constituting approximately $7,000 a month, because of the malpractice committed by the respondents, William Hedrick and Cynthia Giacchetti, as specified by the allegations in this complaint for legal malpractice. (C8)

REASONS FOR GRANTING THE WRIT

I.

THERE MUST BE AN EXHAUSTION OF REMEDIES, THEREBY TOLLING THE ILLINOIS TWO-YEAR STATUTE OF LIMITATIONS FOR THE FILING OF A LEGAL MALPRACTICE ACTION.

On page 3 of the Appellate Court Summary Order, the Appellate Court states that the petitioner should have filed his action for legal malpractice two years from July 18, 1993, after he was sentenced, because at that point of time he learned that he would lose his license to practice law and forfeit certain substantial retirement benefits.

However, the Appellate Court's ruling, that Stillo learned he would lose his license to practice law and forfeit certain substantial retirement benefits on July 18, 1993, is not quite accurate.

In order to determine when a plaintiff has actually learned that he was injured because of a defense attorney's malpractice in a criminal proceeding, the following pertinent language is quoted from *Palmros v. Barcelona*, 284 Ill.App.3d 642 (2d Dist. 1996), at 646:

> Plaintiff asserts that "injury" as used in the statute is synonymous with damages. We agree. A cause of action for attorney malpractice requires an attorney-client relationship, a duty arising from that relationship, a breach of that duty, and actual damages or "injury" proximately caused by that breach. *Goran v. Glieberman*, 276 Ill.App.3d 590, 593 (1995); *Austin's Rack, Inc. v. Gordon & Glickson, P.C.*, 145 Ill.App.3d 500, 503 (1986); *Bartholomew v. Crockett*, 131 Ill.App.3d 456, 465 (1985). Actual damages are an essential element of a cause of action for attorney malpractice; with no damages, no cause of action has accrued. *Bartholomew*, 131 Ill.App.3d at 465-66.
>
> It follows that there can be no "injury for which damages are sought" (735 ILCS 5/13-214.3(b) (West 1994)) until a plaintiff has suffered a loss. As the statute implies, the "injury" is not the negligent act itself; it is something "caused by the [negligent] act or omission" (735 ILCS 5/13-214.3(d) (West 1994)), *viz.*, a loss for which the plaintiff may seek damages. This is consistent with the case law making damages an element of a cause of action.

In this matter, the injury resulting in damages could not accrue until petitioner Stillo had exhausted his appeal remedies, since he could not know nor be expected to have reasonably known if his conviction would be either affirmed or reversed until such a determination were made by the exhaustion of the appellate process.

Relative to the issue of exhaustion of remedies, the Illinois Supreme Court Rule 761(d)(2), governing Illinois attorney discipline, recognizes that there is no finality in a criminal proceeding until the last remedy has been exhausted, which definitely determines the innocence or guilt of a criminal defendant, the said rule being:

> If the attorney has appealed from the conviction, the hearing shall be delayed until completion of the appellate process unless the attorney requests otherwise. If after the completion of the appellate process the conviction has not been reversed, the attorney shall notify the Administrator within 30 days of the mandate being filed in the trial court that the conviction was affirmed. Upon becoming aware that the conviction has been affirmed, the Administrator shall file a complaint with the Hearing Board as described in (1) above.

For purposes of emphasis, the significance of the Illinois Supreme Court disciplinary Rule 761(d)(2) is that the Illinois Supreme Court acknowledged the legal concept of exhaustion of remedies for finalizing innocence or guilt of a criminal defendant.

Applying the exhaustion of remedies principle to these proceedings, the finality of the defendant's in-

nocence or guilt had been determined on October 30, 1998, when the United States Supreme Court denied the petition for writ of certiorari.

II.

A CRIMINAL DEFENDANT NEED NOT PROVE HIS INNOCENCE OF A CRIME BEFORE PROCEEDING WITH A LEGAL MALPRACTICE ACTION AGAINST HIS DEFENSE ATTORNEY.

In *Levine v. Kling*, 123 F.3d 580 (1997), it is the position of the United States Court of Appeals for the Seventh Circuit that the exhaustion of remedies following for a legal malpractice action cannot occur unless the criminal defendant can successfully collaterally attack his conviction by proving that he was innocent of the crime with which he was charged, as stated therein:

> We used the awkward term "guilty in law" to distinguish the case in which the defendant is guilty in fact but has a sound legal defense, such as double jeopardy, from a case in which he is both guilty in fact and has no sound legal defense yet might, because of the heavy burden of proof on the prosecution, have obtained an acquittal if he had had a skillful lawyer. Only in the second case is the malpractice suit against the less-than-skillful lawyer barred.

From the above analysis, the United States Seventh Circuit, at page 2 of the slip opinion, has determined that if the Illinois Supreme Court were faced with the same question, that would be the Illinois Supreme Court's answer; namely, that a criminal defendant could not file a criminal malpractice suit upon the

exhaustion of his appellate remedies unless he could prove his innocence based upon a sound legal defense.

Prior to the entry of the summary order on March 19, 1998, in this matter, there was no published Illinois Appellate or Supreme Court opinion that required that a criminal defendant prove his innocence before he could proceed with a malpractice claim against his defense attorney.

Subsequently, two Illinois Appellate Court decisions have adopted the legal theory as expressed in *Levine v. Kling*, that a criminal defendant must prove his innocence of the crime charged before he can sue his defense attorney.

The two Illinois Appellate Courts that have adopted the innocence rule as enunciated in *Levine v. Kling* are the Illinois Appellate Court, First District, in *Kramer v. Dirksen*, 296 Ill.App.3d 819 (1st Dist. 3d Div., May 20, 1998), and the Illinois Appellate Court, Fifth District, in *Moore v. Owens*, 290 Ill.App.3d 672 (5th Dist., August 11, 1998).

In conjunction with the adoption of the innocence rule by the two Illinois Appellate Court decisions of *Kramer v. Dirksen* and *Moore v. Owens*, both decisions enunciate the innocence rule as viewed from the *Restatement (Second) of Torts*, § 1 comment d, § 7(1) (1965), and the *Moore v. Owens* Appellate Court, at 674-675, states:

> "Tort law provides damages only for harms to the plaintiff's legally protected interests, *Restatement (Second) of Torts*, § 1 comment d, § 71 (1965), and the liberty of a guilty criminal is not one of them. The guilty criminal may be able to obtain an acquittal if he is skillfully rep-

> resented, but he has no right to that result (just as he has no *right* to have the jury nullify the law, though juries sometimes do that), and the law provides no relief if the 'right' is denied him.
>
> Criminal law entitles a criminal defendant to competent counsel, but the consequence if counsel is incompetent and conviction results is a new trial, not an acquittal. *E.g., Holman v. Page*, 95 F.3d 481, 492 (7th Cir. 1996). If the defendant is guilty in law, eventually he will probably be convicted even if competently represented—and he should be. To award the defendant eventually justly convicted and imprisoned substantial money * * * for the loss of his liberty, or for that matter any money, is to give him relief to which criminal law, and the federal constitutional right to counsel, does not entitle him." (Emphasis in original). *Levine*, 123 F.3d at 582.

Relative to the above observations, the minority view does not adopt the legal proposition that, although a criminal defendant is entitled to competent counsel, if counsel is incompetent, and a conviction results, there is no civil legal remedy for damages because there are no damages related to the liberty of a guilty criminal defendant.

Therefore, in this petition for writ of certiorari, the petitioner suggests to the Supreme Court of the United States that it should consider the adoption of the minority view of *Krahn v. Kinney*, 43 Ohio St.3d 103, 105-106, 538 N.E.2d 1058, 1061 (1989), which does not require that a defendant must prove his innocence before having a malpractice claim against the defense

counsel, which claim would arise out of defending a civil defendant in a criminal matter:

> Therefore, we hold that a plaintiff need not allege a reversal of his or her conviction in order to state a cause of action for legal malpractice arising from representation in a criminal proceeding. To plead a cause of action for attorney malpractice arising from criminal representation, a plaintiff must allege (1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach. Krahn's complaint sets forth facts supporting each of these elements and, therefore, states a claim.

Supporting *Krahn v. Kinney* is *Gebhardt v. O'Rourke*, 444 Mich. 535, 510 N.W.2d 900, 908 (1994).

Based upon the above observations of the *Krahn v. Kinney* and *Gebhardt v. O'Rourke* decisions, the petitioner has established by his pleadings that an attorney-client relationship existed giving rise to a duty when he engaged the legal services of William Hedrick and Cynthia Giacchetti, licensed Illinois lawyers, to represent him in a criminal matter that had been pending in the United States District Court, Northern District of Illinois, entitled United States of America v. Adam N. Stillo, Sr., No. 91 CR 795 (C3), that there was a breach of that duty as specified in the statement of facts as enumerated in this petition for leave to appeal (C3-7), and that the damages were proximately caused by the breach when after the denial of the petition for writ of certiorari by the United States Supreme Court, on October 30, 1995, the petitioner was required to forfeit his license to practice as an Illinois attorney, and forfeited his portion of Social Security benefit and

judge's retirement benefit, both constituting approximately $7,000 a month (C8), thereby resulting in a viable cause of action by the petitioner against the respondents.

CONCLUSION

For the above-stated reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDICES

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APPENDIX A

Fourth Division
March 19, 1998

1-97-3885

IN THE
ILLINOIS APPELLATE COURT
FIRST JUDICIAL DISTRICT

ADAM N. STILLO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	97 L 6765
	)	
WILLIAM HEDRICK and	)	Honorable
CYNTHIA GIACCHETTI,	)	Kathy M. Flanagan,
	)	Judge Presiding.
Defendants-Appellees.	)	

SUMMARY ORDER

On July 29, 1993, Adam Stillo (Stillo), a former Cook County circuit judge, was convicted of racketeering in the United States District Court for accepting bribes to fix criminal cases. On July 18, 1993, Stillo was sentenced. Stillo appealed his case to the United States Court of Appeals, which affirmed his conviction. See *United States v. Stillo*, 57 F.3d 553 (7th Cir. 1995). The United States Supreme Court denied Stillo's petition for *certiorari*. See *Stillo v. United States*, 516 U.S. 945, 133 L. Ed. 2d 306, 116 S. Ct. 383 (1995).

On June 6, 1997, Stillo brought a legal malpractice claim against the attorneys who represented him at his Federal criminal trial, William Hedrick and Cynthia Giacchetti. On September 22, 1997, the trial court dismissed Stillo's legal malpractice claim under section

2-619(a)(5) of the Civil Practice Act. See 735 ILCS 5/2-619(a)(5) (West 1992). The trial court held Stillo's claim fell outside the two year limitations period for such claims.

Section 13-214.3(b) of the Civil Practice Act provides:

> "An action for damages based on tort, contract or otherwise *** against an attorney arising out of an act or omission in the performance of professional services *** must be commenced within two years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 1992 & Supp. 1997).

Section 13-214.3, which applies to all actions filed after January 1, 1991, codifies the discovery rule adopted by Illinois courts for legal malpractice claims. See *Goodman v. Harbor Market, Ltd.*, 278 Ill. App. 3d 684 (1995); *Goran v. Glieberman*, 276 Ill. App. 3d 590 (1995).

Stillo contends he discovered his injury only after learning his Federal appeals had failed. Stillo asserts the discovery rule includes an exhaustion-of-remedies rule which tolls the limitations period for legal malpractice during the appellate process. Stillo supports his position by referring to *Levine v. Kling*, 123 F.3d 580 (1997), which held a Federal convict cannot bring a legal malpractice claim until he has successfully overturned his conviction.

First, we note we are bound to follow Illinois Court decisions, not Federal appellate authority. See *SK Handtool Corp. v. Dresser Industries, Inc.*, 246 Ill. App. 3d 979 (1993). We fail to see *Levine*'s application to

section 13-214.3(b), which plainly does not contain a tolling provision for pending appeals.

Second, we agree with the trial court: Stillo knew or reasonably should have known of his injury from his attorneys' alleged malpractice at least as early as his sentencing on July 18, 1993. At his sentencing, Stillo learned he would lose his license to practice law and forfeit certain substantial retirement benefits. "[T]he adverse result at the time of the end of trial is the operative factor of the beginning of the running of the statute of limitations." *Zupan v. Berman*, 142 Ill. App. 3d 396, 399 (1986).

Our conclusion comports with Illinois cases addressing the limitations period in section 13-205, which formerly applied to legal malpractice claims. See *Garcia v. Pinto*, 258 Ill. App. 3d 22 (1993); *Belden v. Emmerman*, 203 Ill. App. 3d 265 (1990); *Zupan*, 142 Ill. App. 3d 396.

Finally, we fail to see how Illinois Supreme Court Rule 761(d)(2) (see 107 Ill. 2d R. 761(d)(2)) applies in this context. Rule 761 governs the discipline of attorneys convicted of crimes, not the limitations period for legal malpractice.

The trial court correctly dismissed Stillo's legal malpractice claim as time-barred.

Affirmed in accordance with Supreme Court Rule 23(c)(2).

WOLFSON, J., with McNAMARA and SOUTH, JJ., concurring.

APPENDIX B

ILLINOIS SUPREME COURT
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October 6, 1998

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No. 85334 – Adam N. Stillo, petitioner, v. William Hedrick et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1998.